IN THE

Supreme Court of the United States

October Term—1944

No. 1068

EDNA BENTON WAKE WYMAN and EDWARD B. BARTLETT, as Executors under the Last Will and Testament of EDWARD E. WYMAN, deceased,
Petitioners,

against

PAN AMERICAN AIRWAYS, INC.,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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Statement.

Petitioners, as Executors of Edward E. Wyman, deceased, seek a writ of certiorari to review a decision of the Court of Appeals of the State of New York, affirming a decision of the New York Supreme Court directing a verdict for $8,300 in petitioners' favor in an action resulting from the death of their testator, who was a passenger on the aircraft "Hawaii Clipper" which disappeared without trace in the Pacific Ocean between Guam and Manila, P. I., July 29, 1938. The decision of the Trial Court is reported in 181 Misc. 963, 43 N. Y. S. (2d) 420, and appears at folios 364-372 of the Record. It was unanimously affirmed without opinion, both by the Appellate Division of the Supreme

Court, 267 App. Div. 947, and by the New York Court of Appeals, 293 N. Y. 878.

The decedent was enroute from San Francisco to Hong Kong (Plaintiffs' Exs. 1, 2 and 26). His transportation was subject to the Warsaw Convention,* 49 Stat. pt. 2, pp. 3000 *et seq.*, an international treaty regulating and limiting the rights of passengers and carriers in international air transportation. The Convention provides that the carrier shall be liable for death or injury of a passenger during such transportation unless the carrier proves that it took all necessary measures to avoid the damage (Articles 17, 20). Article 22, however, limits the carrier's liability to 125,000 gold francs (approximately $8,300) per passenger unless, as provided in Article 25, the damage is caused by the wilful misconduct of the carrier or his agents.

The Lower Court held (1) that there was "no proof in this case of 'wilful misconduct' on the part of the defendant", and (2) *that there was "indeed, no proof of any negligence connected with or a proximate cause of the accident"* (f. 367), but in view of the presumption of liability created by the Convention, directed a verdict in favor of petitioners for $8,300. The Court said (f. 368):

> "The case at bar would thus seem to be within the very situation embraced by the rules of the Warsaw Convention which here operate to permit a recovery that otherwise might be impossible for want of proof. On these considerations at the conclusion

* The Convention is officially entitled "The Convention for the Unification of Certain Rules Relating to International Transportation by Air, and Additional Protocol." It was signed at Warsaw October 12, 1929, and has been ratified or adhered to by substantially all of the leading commercial nations of the world, among them the United States, as well as Great Britain and her colonies, including Hong Kong. See *A List of Treaties and Other International Acts of the United States in Force on December 31, 1941*, page 126, published by the Department of State in 1944, Publication No. 2103.

of the trial, a verdict was directed for plaintiffs in the sum of $8,300, in accordance with the rules stated."

The Facts.

Petitioners' statement of facts is highly colored by references to leakages of gasoline into the sea wing bilges and to the fact that the pilot mentioned the presence of rain and lightning in some of his radioed reports on the final flight, the inference being that gasoline was ignited causing the plane to explode, thus explaining the disappearance.

The Court held that the evidence of leakages of gasoline was not sufficient to justify even an inference of ordinary negligence, stating (ff. 290-291):

> "I cannot permit this jury to conjecture or guess that it was because of leaks caused by faulty construction of the tanks that this catastrophe occurred. There is nothing in the case from which they can reasonably infer that the gas was caused to ignite or that whatever occurred was because of the defendant's employees' negligence."

The evidence on the subject was as follows: At certain of the intermediate stops made by the aircraft while en route across the Pacific Ocean, although not at all of them, small amounts of gasoline were found to be present in the sea wing bilges located inside two small wings projected outward from either side of the hull of the aircraft and forming the pontoons on which, with the hull, the aircraft was designed to rest on the water. Without discussing the evidence in detail, it is sufficient to point out that there was no evidence (1) that gasoline had ever leaked out of the airplane itself, (2) that gasoline was present in the sea wing bilges after the airplane left Guam, (3) that there was a spark or any likelihood of a spark which might have ignited gaso-

line inside the bilges, or (4) that, even assuming the unproved fact that gasoline had leaked from the tanks into the sea wing bilges at the time the aircraft disappeared, there was any greater danger of explosion from the presence of gasoline in the bilges than from its presence in the tanks themselves. In fact, Dr. Dingwall, an expert called by the petitioners to testify to the explosive properties of gasoline, said on this subject (ff. 208-209):

> "Q. And Dr. Dingwall, so far as the properties, the chemical properties of gasoline are concerned, do they vary in any way whether the gasoline or its vapor is found in the bilge of an airplane or in any other receptacle? A. They do not."

Petitioners refer at page 9 of the petition to the fact that the weather forecast previous to the plane's departure from Guam called for "widely scattered thundershowers over archipelago" (Plaintiffs' Ex. 3), but the archipelago, *i. e.*, the Philippine archipelago, was 400 miles distant from the position of the aircraft at the time of the final message (Plaintiffs' Ex. 4). They also call attention to the captain's reports of lightning in two of his hourly messages (ff. 159, 160), whereas the fact is that the only reports of lighting were contained in messages sent at 8 A. M. and 9 A. M. Guam time, more than five hours before the last message was received from the plane (Plaintiffs' Ex. 4). As the petitioners point out at page 9, the position reports received by radio indicate that the plane, probably because of adverse weather, deviated somewhat to the southward of the direct course several hours after leaving Guam. However, whatever weather conditions were encountered at the time of the deviation had evidently been successfully overcome, since at the time of the last message the plane had been traveling on a new course directly toward Manila for more than 200 miles (Plaintiffs' Ex. 4).

The plain facts are that the "Hawaii Clipper" vanished while traveling over a 1500-mile stretch of unbroken ocean, the cause of the disappearance is completely unknown, and no trace of the aircraft has ever been found. Under such circumstances the Court's ruling that the petitioners failed even to make out a case of ordinary negligence is unassailable.

POINT I.

The Warsaw Convention was applied for the benefit of the petitioners, not to their detriment.

Petitioners invoke the jurisdiction of the Court on the ground that there is here involved the interpretation of a treaty of the United States, and they claim that the treaty has been applied to deprive them of damages which they might otherwise have recovered. This is not the fact.

The fact is that the treaty was applied for the petitioners' benefit, not to their detriment. The Trial Court held that they had failed to make out even a case of simple negligence against the carrier. The Court said (f. 367):

> "There was no proof in this case of 'wilful misconduct' on the part of the defendant * * *, *and, indeed, no proof of any negligence connected with or a proximate cause of the accident* * * *." (Italics ours.)

See, also, the Court's statement at folios 290-291, quoted above at page 3.

But for the presumption of liability created by the treaty, the petitioners would have recovered nothing—a point that was emphasized by the Trial Court (f. 368). Having thus received the benefit of the treaty, the petitioners

are in no position to complain of its application. *Alexander* v. *Cosden Pipe Line Co.*, 290 U. S. 484, 487.

The Appellate Division and the Court of Appeals unanimously affirmed the decision, both without opinion. 267 App. Div. 947; 293 N. Y. 878. It would be the purest conjecture to surmise that the grounds of their decisions were any different from those expressed in the court of first instance.

POINT II.

Petitioners' contentions that the New York courts improperly construed Articles 22 and 25 of the Warsaw Convention are without substance.

Article 22 (1) of the Warsaw Convention provides:

> "(1) In the transportation of passengers the liability of the carrier for each passenger shall be limited to the sum of 125,000 francs. * * * Nevertheless, by special contract, the carrier and the passenger may agree to a higher limit of liability."

Petitioners infer that the provision authorizing the carrier and the passenger to agree to a higher limit of liability was adopted for the purpose of allowing carriers, when making contracts, to comply with any local law based on public policy requiring the carrier to give passengers a choice of rates. Having so inferred, the petitioners conclude that, because the Convention permits carriers to make a contract in accord with local public policy, they are required to do so, thereby converting a permissive into a compulsory provision. The argument is clearly without merit. It is perfectly obvious that the provision referred to simply expresses the intent of the framers of the Convention to leave the right of contracting as it stood before the treaty

was adopted. See *Railroad Co.* v. *Lockwood*, 17 Wall. (84 U. S.) 357, 361, and *Walker* v. *The Transportation Co.*, 3 Wall. (70 U. S.) 150, 155, discussing the effect of a similar clause in the statute limiting shipowners' liability in case of fire. Moreover, the provisions of the Convention, as the "supreme law of the land" (Const., Art. VI), necessarily override any local rules of public policy. *U. S.* v. *Belmont*, 301 U. S. 324, 327; *U. S.* v. *Pink*, 315 U. S. 203, 231-232. See, also, *The Amiable Isabella*, 6 Wheat. (19 U. S.) 1, 72-73.

Petitioners' suggestion (pp. 16-18) that because the passenger was not informed of the terms of the Convention or of the fact that it applied to the transportation in question, he was not bound thereby, is wholly without substance. The provisions of the Convention and the adherence of the British Government on behalf of Hong Kong were matters of public record. 49 Stat. 3000; U. S. State Dept. Treaty Information Bulletin No. 65, February, 1935, page 10. The petitioners' argument is, in effect, that their testator was not presumed to know the law. *Cf. Pettibone* v. *Cook County, Minnesota*, 120 F. (2d) 850, 854-855 (C. C. A. 8).

Petitioners' final contention, appearing in Point II of their brief, is that the expression "wilful misconduct" in Article 25 of the treaty should be construed to mean "gross negligence". As pointed out above, the Trial Court held not only that there was no proof of wilful misconduct, but that the petitioners had not even made out a case of ordinary negligence against the carrier (f. 367). These findings, amply supported by the evidence and already sustained by two appellate courts, are beyond the power of this Court to review. *Milk Wagon Drivers Union* v. *Meadowmoor Dairies, Inc.*, 312 U. S. 287, 294. In any event, the authorities do not support petitioners' contention. See *Wass* v. *Stephens*, 128 N. Y. 123, 128-129; *Boyce* v. *Greeley Square Hotel Co.*, 228 N. Y. 106, 111; *Lewis* v. *Great West-*

ern Ry Co., 3 Q. B. Div. 195, 206, 213; Geodhuis, "National Air Legislations and The Warsaw Convention" (1937), pp. 274-275.

Conclusion.

The petition should be denied.

Respectfully submitted,

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